No. 80-716

In the Supreme Court of the United States

OCTOBER TERM, 1980

LONE STAR STEEL COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD AND
UNITED MINE WORKERS OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

WILLIAM A. LUBBERS
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Acting Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

DAVID FLEISCHER
Attorney
National Labor Relations Board
Washington, D.C. 20570

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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QUESTIONS PRESENTED

1. Whether the Board properly found that a contract clause conditioning the sale or transfer of any facility covered by the collective bargaining agreement upon obtaining the successor employer's consent to abide by the provisions of the agreement is a mandatory subject of bargaining, and that the union's strike regarding that clause therefore did not violate Section 8(b)(3) of the National Labor Relations Act (the Act), 29 U.S.C. 158(b)(3).

2. Whether the Board properly concluded that the successorship clause described in Question 1 does not

violate Section 8(e) of the Act, 29 U.S.C. 158(e), and that the union therefore did not violate Section 8(b)(4)(A) of the Act, 29 U.S.C. 158(b)(4)(A), by striking with regard to that clause.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	4
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Allied Chemical & Alkali Workers of America, Local Union No. 1 v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157	4, 5
Amax Coal Co. v. *NLRB*, 614 F.2d 872, petitions for cert. pending, Nos. 80-289 and 80-692	5, 6, 7, 9
Detroit Edison Co. v. *NLRB*, 440 U.S. 301	5
District No. 71, IAM (Harris Truck and Trailer Sales, Inc.), 224 N.L.R.B. 100	6-7
Ford Motor Co. v. *NLRB*, 441 U.S. 488	5
Howard Johnson Co. v. *Hotel & Restaurant Employees*, 417 U.S. 249	6
IBEW, Local 501 v. *NLRB*, 181 F.2d 34, aff'd, 341 U.S. 694	6, 7
International Union of Operating Engineers, Local No. 701, AFL-CIO (Cascade Employers Ass'n), 221 N.L.R.B. 751	7
NLRB v. *Burns International Security Services, Inc.*, 406 U.S. 272	6
NLRB v. *Hotel & Restaurant Employees & Bartenders' Union Local 531*, 623 F.2d 61	6
National Maritime Union of America, AFL-CIO (Commerce Tankers Corp.), 196 N.L.R.B. 1100, enforced, 486 F.2d 907, cert. denied, 416 U.S. 970	7

Cases—Continued: Page

National Woodwork Manufacturers Ass'n v. *NLRB*, 386 U.S. 612 ..... 7, 8

UAW v. *NLRB*, 470 F.2d 422, aff'g 191 N.L.R.B. 951 5

Universal Camera Corp. v. *NLRB*, 340 U.S. 474 9

Statute:

National Labor Relations Act, 29 U.S.C. 151 *et seq.*:

Section 8(b)(3), 29 U.S.C. 158(b)(3) 3
Section 8(b)(4)(A), 29 U.S.C. 158(b)(4)(A) .. 3
Section 8(b)(4)(B), 29 U.S.C. 158(b)(4)(B) .. 6, 7
Section 8(d), 29 U.S.C. 158(d) 4
Section 8(e), 29 U.S.C. 158(e)..... 2, 3, 4, 6, 7, 8
Section 10(e), 29 U.S.C. 160(e)..... 5

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A29) is not yet reported. The Board's decision and order (Pet. App. C1–C20) are reported at 231 N.L.R.B. 573.

JURISDICTION

The judgment of the court of appeals was entered on September 12, 1980. The petition for a writ of certiorari was filed on October 25, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, which is primarily engaged in the manufacturing of steel pipe for the oil and gas industry, owns the rights to coal at the Starlight mine near McCurtain, Oklahoma. Prior to April 1973, the coal was mined by another corporation, whose employees were represented by the United Mine Workers of America ("the Union") and were covered by the National Bituminous Coal Wage Agreement ("the Agreement") between the Union and the Bituminous Coal Operators' Association ("BCOA") (Pet. App. C3, D3). Beginning in April 1973, petitioner operated the Starlight mine itself, retaining the same employees and continuing to abide by the terms of the Agreement (Pet. App. D3).

In September 1974, the Union notified all independent signatories of the Agreement, including petitioner, that it wished to terminate the Agreement and negotiate a new one. It asked them to sign a letter of intent to be bound by any new national agreement between the Union and the BCOA. Petitioner declined to sign the letter of intent and insisted on negotiating a

new contract separately. On November 12, 1974, when the old Agreement expired, the employees at the Starlight mine joined other members of the Union in a nationwide strike (Pet. App. C5).

The Union and the BCOA executed a new national agreement on December 5, 1974. However, petitioner declined to accept the terms of this agreement, and the strike continued at the Starlight mine (Pet. App. C5, D4). Petitioner objected to several clauses in the national agreement, including the "successorship" clause, which read:

> In consideration of the Union's execution of this Agreement, each Employer promises that its operations covered by this Agreement shall not be sold, conveyed, or otherwise transferred or assigned to any successor without first securing the agreement of the successor to assume the Employer's obligations under this Agreement. Provided that the Employer shall not be a guarantor or be held liable for any breach by the successor or assignee of its obligations, and the UMWA will look exclusively to the successor or assignee for compliance with the terms of this Agreement. [Pet. App. E1.]

On January 6, 1975, the Union agreed to have the employees return to work for 60 days (Pet. App. C5). However, further bargaining sessions failed to produce agreement on the matters in dispute. The strike resumed on March 8 and was still in progress at the time of the Board's hearing (Pet. 4-5; Pet. App. C5, D4).

2. The Board found that the "successorship" clause did not violate Section 8(e) of the National Labor Relations Act (the Act), which provides in part that it is an unfair labor practice for an employer and a union to agree for the employer "to cease doing business with any other person." 29 U.S.C. 158(e). The Board explained that the

transactions covered by the clause did not constitute "doing business" within the meaning of that section, because the employees could be expected to retain their jobs if the mine were sold to a successor. Thus, such a sale would merely involve the substitution of one entity for another while the conduct of the business continued without interruption. Accordingly, the Board concluded that the Union did not violate Section 8(b)(4)(A) of the Act, 29 U.S.C. 158(b)(4)(A), by striking to obtain the "successorship" clause (Pet. App. C6–C8).

The Board further found that the "successorship" clause was a mandatory subject of bargaining, and that the Union's strike regarding the clause therefore did not violate Section 8(b)(3) of the Act, 29 U.S.C. 158(b)(3).[1] The Board found that the "successorship" clause would be vital to the protection of the employees' previously negotiated wages and working conditions, as a successor would not be bound by the terms of the contract in the absence of such a clause (Pet. App. C9–C10). Accordingly, the Board dismissed the complaint in this respect (Pet. App. C12).[2]

3. The court of appeals upheld the Board's decision regarding the "successorship" clause. The court agreed with the Board that the sale of capital assets (coal lands) would not create a continuing business relationship, and that therefore such a transaction did not constitute "doing business" within the meaning of Section 8(e) of the Act (Pet. App. A10–A16). The court further concluded that the "successorship" clause vitally affects the

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[1] The Board reached a similar conclusion with respect to an "application of contract" clause that the Union demanded (Pet. App. C10–C12). The court of appeals reversed the Board's ruling on this clause (Pet. App. A23–A28), and the Board has filed a conditional cross-petition for a writ of certiorari on that issue. See *NLRB* v. *Lone Star Steel Co.*, No. 80–940.

[2] Member Walther dissented.

terms and conditions of employment of unit employees, and that this effect outweighs any inhibition on the transfer of capital that might result from the clause (Pet. App. A17–A23).[3]

ARGUMENT

The decision of the court of appeals regarding the "successorship" clause is correct and does not conflict with any decision of this Court or of any court of appeals. Further review is unwarranted.

1. Petitioner contends (Pet. 12–18) that the successorship clause proffered by the Union is not a mandatory subject of bargaining under Section 8(d) of the Act, 29 U.S.C. 158(d). But, as both the court below and the Board concluded (Pet. App. A17–A22, C9–C10), a successorship clause is necessary to ensure the preservation of the contractual wages and working conditions for the entire term of the contract. Without such a clause, the purchaser of petitioner's mine could refuse to abide by the terms of the collective bargaining agreement even though the same employees continued to work the mine. In that circumstance, the employees would be required to "start all over again" (*id.* at A19)—that is, strike anew in order to retain the benefits that they had won in the original strike. Accordingly, although the successorship clause arguably affects the interests of persons not party to the contract (*i.e.*, prospective purchasers), the clause "vitally affects" the terms and conditions of unit employees and is therefore a mandatory subject of bargaining. See *Allied Chemical & Alkali Workers of America, Local Union No. 1* v. *Pittsburgh Plate*

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[3]Judge Barrett, dissenting in part, agreed that the "successorship" clause did not violate Section 8(e) of the Act but would have found that it was not a mandatory subject of bargaining (Pet. App. A28–A29).

Glass Co., 404 U.S. 157, 178–179 (1971). See also *Ford Motor Co.* v. *NLRB*, 441 U.S. 488 (1979).

Contrary to petitioner's claim (Pet. 13–14), the holding of the court of appeals with regard to the successorship clause is not in conflict with the decision of the Third Circuit in *Amax Coal Co.* v. *NLRB*, 614 F.2d 872 (1980), petitions for cert. pending, Nos. 80–289 and 80–692. In *Amax*, the court of appeals, like the court below (Pet. App. A27), found that an "*application of contract*" clause was not a mandatory subject of bargaining. See 614 F.2d at 883–884.[4] But the Third Circuit expressly declined (*id.* at 887 n.13) to address the question whether the *successorship* clause that is at issue here is also a nonmandatory subject of bargaining, because that issue had not been raised before the Board in that case. See 29 U.S.C. 160(e); *Detroit Edison Co.* v. *NLRB*, 440 U.S. 301, 311 & n.10 (1979). There is thus no basis for petitioner's claim of conflict. See also *UAW* v. *NLRB*, 470 F.2d 422 (D.C. Cir. 1972), aff'g 191 N.L.R.B. 951 (1971) (employer must bargain about the effects of his decision to sell all or part of his business).[5]

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[4] The Board disagrees with the conclusion that the application of contract clause is not a mandatory subject of bargaining. See note 1, *supra*. In any event, the rationale underlying that decision—that the application of contract clause will expand the certified bargaining unit—is wholly inapplicable to the successorship clause, which pertains only to the bargaining unit.

[5] Petitioner erroneously suggests (Pet. 17–18) that the conclusion that the successorship clause is a mandatory subject of bargaining will unlawfully permit the union to compel bargaining over the employer's decision to sell. The clause relates only to the effects of a sale on unit employees, however. It does not require petitioner to notify the Union regarding a contemplated sale, much less to bargain with the Union before making a decision to sell the mine. And, of course, petitioner was under no obligation to agree to such a clause; rather, it was simply required to bargain with regard to the clause.

Similarly, nothing in this Court's decisions in *Howard Johnson Co.* v. *Hotel & Restaurant Employees*, 417 U.S. 249 (1974), and *NLRB* v. *Burns International Security Services, Inc.*, 406 U.S. 272 (1972), suggests that a successorship clause is not a mandatory subject of bargaining or otherwise against public policy. To be sure, a successor employer is not necessarily bound to honor the predecessor employer's contract, including a successorship clause, when the successor does not hire the seller's employees. See 417 U.S. at 257–265; 406 U.S. at 287–291. But the Court also specifically recognized that a successorship clause is enforceable against an employer by arbitration and injunction (417 U.S. at 257–258 & n.3) and that a successor employer in appropriate circumstances may be deemed to have assumed the obligations of the predecessor employer under the collective bargaining agreement (406 U.S. at 291).

2. Petitioner also incorrectly asserts (Pet. 18–23) that the successorship clause violates Section 8(e) of the Act, 29 U.S.C. 158(e).[6] But, as every court of appeals that has considered the question has concluded, Section 8(e) does not concern the permanent transfer of all or part of a business to a purchaser who continues to conduct the same business. See *NLRB* v. *Hotel & Restaurant Employees & Bartenders' Union Local 531*, 623 F.2d 61, 66–67 (9th Cir. 1980); *Amax Coal Co.* v. *NLRB*, *supra*, 614 F.2d at 885–887; Pet. App. A14–A15. See also *IBEW, Local 501* v. *NLRB*, 181 F.2d 34, 37 (2d Cir. 1950), aff'd, 341 U.S. 694 (1951);[7] *District No. 71, IAM (Harris Truck and Trailer Sales, Inc.)*, 224 N.L.R.B. 100 (1976); *International Union of Operating En-*

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[6] Section 8(e) makes it unlawful for a union and an employer to enter into an agreement requiring the employer "to cease doing business with any other person." 29 U.S.C. 158(e).

[7] In *IBEW, Local 501* v. *NLRB*, *supra*, the court of appeals construed former Section 8(b)(4)(A), now 29 U.S.C. 158(b)(4)(B),

gineers, Local No. 701, AFL-CIO (Cascade Employers Ass'n), 221 N.L.R.B. 751 (1975). As the Third Circuit explained in *Amax Coal*, "[t]he phrase 'doing business' refers to a continuing business relationship which is capable of being discontinued by one employer in order to force another employer to accede to union demands." 614 F.2d at 885–886.

The Board's interpretation of Section 8(e) is consistent with the legislative intent informing that statute. In *National Woodwork Manufacturers Ass'n* v. *NLRB*, 386 U.S. 612, 634–637 (1967), the Court explained that Congress was concerned about agreements that would enmesh neutral employers in the labor disputes of other employers. Such agreements would pressure neutral employers to curtail their relationships or to refuse to enter into relationships with employers with whom the union might have a dispute. This evil can occur only where there is a possibility of a continuing business relationship, or repeated transactions, between the neutral and primary employers.[8] For example, a clause dealing with leasing or subcontracting can embroil a neutral employer in the labor

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concluding that " 'doing business' would ordinarily cover doing any business which the [neutral employer] is free to discontinue." 181 F.2d at 37. It is settled that the language of Section 8(e) is to be construed in harmony with Section 8(b)(4)(B). See *National Woodwork Manufacturers Ass'n* v. *NLRB*, 386 U.S. 612, 635, 637–638 (1967).

[8] *National Maritime Union of America, AFL-CIO (Commerce Tankers Corp.)*, 196 N.L.R.B. 1100 (1972), enforced, 486 F.2d 907 (2d Cir. 1973), cert. denied, 416 U.S. 970 (1974), cited by petitioner (Pet. 10), involved the possibility of repeated transactions, since the record showed that sales of ships occurred in the normal course of business in the maritime industry. Both the Board (196 N.L.R.B. at 1101) and the Second Circuit (486 F.2d at 911) expressly disclaimed any intention to hold that Section 8(e) covered the isolated sale of a capital asset. Here, as the court of appeals specifically noted (Pet. App. A14–A15 & n.18),

disputes of the lessee or subcontractor, because the union can pressure the neutral employer to cancel the lease or subcontract. In contrast, the sale of a capital asset creates no continuing relationship that the union can seek to disrupt. Once the sale is consummated, the union cannot hope to achieve victory in a dispute with the purchaser by engaging in coercive conduct against the seller. Indeed, the "successorship" clause in question here expressly prohibits the Union from taking action against the seller if the purchaser rejects the contract between the seller and the Union; it specifies (see page 2, *supra*) that the Union must "look exclusively to the successor * * * for compliance with the terms of this Agreement." Thus, the "successorship" clause cannot result in the evils that Section 8(e) was designed to prevent.

Moreover, the effect of the "successorship" clause is primary under *National Woodwork*, because it is designed to protect the contractual benefits of unit employees and not to satisfy union objectives elsewhere. See 386 U.S. at 633-642. As both the Board (Pet. App.C8) and the court of appeals (*id.* at A10) pointed out, past practice in the coal industry shows that employees at a particular mine are likely to retain their jobs when the mine is sold to a new owner. Thus, whatever might be said of a "successorship" clause in an industry where a change of ownership might mean a change of employees (see note 8, *supra*), it is clear that, in this case, the clause would serve only the

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the evidence did not establish that petitioner regularly sold coal lands.

Moreover, the clause in *Commerce Tankers* benefitted union members generally, rather than unit employees, since purchasers of ships did not normally retain the seller's employees. The opposite situation prevails in the coal industry where employees remain at the same mine even when its ownership changes hands. See pages 8-9, *infra*.

lawful purpose of ensuring that the same employees would work under the same conditions even if they had a new employer. See *Amax Coal Co.* v. *NLRB*, *supra*, 614 F.2d at 886-887.[9]

Petitioner (Pet. 21-23) challenges the Board's interpretation of the "successorship" clause as applying solely to a permanent transfer of property, and not to such temporary arrangements as leasing, licensing out, and subcontracting. However, this factual argument does not warrant further review. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951). In any event, the Board's construction of the clause, which was sustained by the court of appeals (Pet. App. A16), was clearly reasonable in view of the presence in the contract of other clauses dealing specifically with leasing, licensing out, and subcontracting (Pet. App. E5-E6). Those clauses would serve no purpose if the "successorship" clause applied to such transactions (*ibid.*).[10]

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[9] Indeed, the clause, by its own terms, is applicable only to sales of mines to a "successor"—a term generally understood to refer only to a purchaser who retains the seller's employees. See *NLRB* v. *Burns International Security Services, Inc.*, 406 U.S. 272 (1972).

[10] Petitioner erroneously argues (Pet. 23) that, because the Board and Third Circuit found some of these clauses unlawful in *Amax*, *supra*, they cannot be considered in interpreting the "successorship" clause. It is the existence, not the legality, of the other clauses that is significant.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

WILLIAM A. LUBBERS
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Acting Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

DAVID A. FLEISCHER
Attorney
National Labor Relations Board

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